

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DONALD and KATHERINE CAPARRO, :
as next friends and parents of :
GREGORY CAPARRO :
Plaintiffs, :

CIVIL ACTION

v.

NO. 95-2310

WOODS SERVICES, INC., :
Defendant. :

MEMORANDUM-ORDER

In the instant case, plaintiffs, Donald and Katherine Caparro, seek to go to trial solely on the issue of damages relating to the negligence liability of defendant, Woods Services, in the near-drowning incident of their son, Gregory Caparro. At the time of the incident, Gregory Caparro, a mentally-retarded adult, was in the care of Woods Services and living at the Woods facility. Moreover, since the near-drowning incident, the Caparros have withheld payment from Woods. Thus, at the impending trial, defendant Woods Services will pursue a breach of contract claim against the Caparros in addition to defending against the Caparros claim for negligence damages.¹

¹ The negligence liability of Woods Services to the Caparros was already decided by partial summary judgment. See Order dated Apr. 4, 1997 granting partial summary judgment in negligence claim only with regard to liability (docket entry 48).

Currently before the Court is Plaintiffs' Motion In Limine, Defendant's Response thereto, as well as Plaintiffs' Reply to Defendant's Response, Defendant's Supplemental Response, Plaintiffs' letter Reply thereto, and Defendant's letter Response thereto. Plaintiffs' Motion In Limine seeks a Court order in advance of trial barring the Defendants from:

- A. Telling or suggesting to the jury that plaintiffs' contract claim against Woods was filed after, or in response to, or to counter the defendant's state law contract suit against the Caparros;
- B. Telling or suggesting to the jury that Woods "never denied" liability on our negligence claim;
- C. Telling or suggesting to the jury that Woods' concession that it was liable on negligence was made solely for its failure to put a life jacket on Greg Caparro, not for failing to supervise him;
- D. Calling any witness who was not properly identified in discovery; and
- E. Using improper opinion testimony from plaintiff Don Caparro concerning his settlement position or evaluation of the worth of the case.

(Pls.' Mot. In Limine at 1-2.)

A motion in limine is designed to narrow the evidentiary issues for trial and to eliminate unnecessary trial interruptions. Bradley v. Pittsburgh Bd. of Educ., 913 F.2d 1064, 1069 (3d Cir. 1990). It is a recognized method for obtaining a pretrial order for simplifying issues for trial, including the exclusion of irrelevant evidence on the grounds that it is offered to prove a legally deficient claim. White Mountain Apache Tribe of Arizona v. United States, 10 Cl.Ct. 115 (1986). Such a motion enables the court to rule in advance on the admissibility of documentary or testimonial evidence so as to expedite the subsequent trial and make it more efficient. Inslaw, Inc. v. United States, 35 Fed.Cl. 295 (1996).

With respect to Plaintiffs' first issue in this motion, they seek to keep the defendant from "[t]elling or suggesting to the jury that plaintiffs' contract claim against

Woods was filed after, or in response to, or to counter the defendant's state law contract suit against the Caparros." (Pls.' Mot. In Limine at 1-2.) Defendants, on the other hand, argue that they are entitled to inform the jury that they threatened legal action to recover the outstanding balance on the Caparros' account prior to the Caparros' assertion of a claim for a refund of fees paid. Defendants have proffered evidence which supports their position. (See Defs.' Resp. to Pls.' Mot. in Limine, Ex. "B.") The fact that the defendants *threatened* legal action to recover past due payments prior to plaintiffs' filing of a contract claim against them does not mean that they actually *filed* a suit prior to plaintiffs' suit. The defendants are entitled to present relevant evidence as both a defense against negligence damages and in furtherance of their contract dispute counterclaim. Accordingly, there is no reason to grant plaintiffs' pretrial motion with respect to this factual issue.

For similar reasons, there is no need to grant Plaintiffs' pretrial motion with respect to the second of plaintiffs' issue. Regarding the second issue, plaintiffs seek an order barring defendant from "[t]elling or suggesting to the jury that Woods 'never denied' liability on our negligence claim." (See Pls.' Mot. In Limine at 2.) Defendants assert that they are "entitled to advise the jury that [they have] admitted liability with regard to the swimming pool incident since the time of that accident." (See Defs.' Resp. to Pls.' Mot. in Limine at 3-4.) As this is a factual issue, the truth of which will depend on the evidence offered at trial, it is not appropriate to grant plaintiffs' pretrial motion with respect to this issue.

Regarding plaintiffs' third issue, plaintiffs seek an order barring defendant from, "[t]elling or suggesting to the jury that Woods' concession that it was liable on

negligence was made solely for its failure to put a life jacket on Greg Caparro, not for failing to supervise him.” (Pls.’ Mot. In Limine at 2.) The defendants, however, argue that they are entitled to “advise the jury that [their] admission of liability was limited to the events surrounding the April 23, 1994 incident.” (Defs.’ Resp. to Pls.’ Mot. in Limine at 5.) As with the previous two issues in plaintiffs’ motion, the evidence presented at trial will determine what the Court will allow by either party.

Plaintiffs’ fourth issue in their Motion in Limine seeks an order prohibiting the defendants from “[c]alling any witness who was not properly identified in discovery.” (Pls.’ Mot. In Limine at 2.) Defendant argues that the plaintiffs have not established valid justification for the imposition of the severe sanction of precluding a witness from testifying.

Initially, the Court notes that absent a showing of willful deceit or flagrant disregard of a court’s order, the extreme sanction of precluding critical evidence should not be imposed. Dudley v. South Jersey Metal, Inc., 555 F.2d 96 (3d Cir. 1977). To give guidance as to when witness testimony should be precluded,

[t]he Third Circuit has delineated four factors to consider when deciding to exclude or permit a witness’ testimony: (1) The prejudice or surprise in fact of the party against whom the excluded witnesses are to testify; (2) The ability of that party to cure the prejudice; (3) The extent to which the waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court; and (4) Bad faith or willfulness in failing to comply with the court’s order.

Kotes v. Super Fresh Food Markets, Inc., 157 F.R.D. 18, 20 (E.D.Pa. 1994) (citations omitted). In addition, courts should also consider the importance of the excluded testimony. Id.

In the instant case, the deadline for a discovery cut off was set for May 13, 1996.

On July 10, 1996, the Court denied defendant's Motion for an extension of the discovery completion deadline. The case was listed for trial in June of 1997. After being postponed twice at the request of the parties, it now sits listed first on the Court's trial pool. On September 3, 1997, after plaintiffs had filed this instant motion seeking to bar the testimony of unlisted witnesses, the defendants filed a "Supplemental Answer" to discovery identifying more witnesses they intended to call at trial. Of those additional witnesses, plaintiffs have had the opportunity to depose all but two, Drs. Griffith and Graziani. Accordingly, plaintiffs now seek to keep Drs. Griffith and Graziani from testifying because, they argue, having these witnesses sprung on them so long after the end of discovery, on the eve of trial, will prejudice their case.

With respect to Dr. Graziani, defendants intend to offer him solely as one of Gregory Caparro's treating physicians, and not as an expert witness. Similarly, Dr. Griffith will be offered by defendant solely on the issue of Defendant's breach of contract claim against the plaintiffs. As neither witness is being offered as an expert, there are no expert reports nor Curriculum Vitae with respect to either doctor.

The basis of Dr. Graziani's proposed testimony in this case will be the neurologic evaluations he conducted of Gregory Caparro following the swimming pool incident. First, Mrs. Caparro attended the two evaluations which form the basis of the reports. Second, the substance of his proposed testimony is contained in his May 4, 1994 report, which defendant produced during the course of discovery in this litigation. Third, plaintiffs were provided with copies of all of Dr. Graziani's reports prior to the initiation of this lawsuit.

Moreover, in June of 1997, defense counsel coordinated with plaintiff's counsel

to schedule the videotape deposition of Dr. Graziani to obviate the need for Dr. Graziani to appear live at trial. The deposition was scheduled for July 1, 1997, but was subsequently canceled. Thus, plaintiffs have known since July 1997 that defendants intended to present testimony from Dr. Graziani at trial.

Similarly, the proposed testimony of Dr. Griffith should be no surprise to the plaintiffs. Kevin Fee, the Woods financial director was deposed at length regarding defendant's breach of contract claim against the Caparros. He has since terminated his employment at Woods Services. Accordingly, the defendants now wish to call Woods Services executive director, Dr. Griffith, to testify about what Kevin Fee would have testified about. Furthermore, Defendants assert that Dr. Griffith will testify only about issues related to the facts regarding the breach of contract claim, and not, as plaintiffs suggest, in the capacity of an expert on Gregory's neurologic condition. Should the defendants attempt to use Dr. Griffith as an expert at trial, plaintiffs may object at trial and obtain an appropriate ruling.

Moreover, in both the case of Dr. Graziani and Dr. Griffith plaintiffs possess the ability to cure any residual prejudice by simply scheduling depositions of the doctors. It is not as if either of these doctors are new or unfamiliar to the counsel for either party in this litigation. Dr. Griffith has served as executive director of Woods Services throughout the time of Gregory Caparro's residence at Woods and continuing to the present. Dr. Graziani has been known to both parties as the physician who performed neurologic evaluations of Gregory Caparro after the near-drowning incident. Though the trial is listed first on the Court's civil trial docket, further discovery may be requested as to said witnesses. Thus, if plaintiffs feel that they need more time to depose a

witness whose proposed testimony they claim would surprise or prejudice them, they may ask the Court to enlarge the time for discovery.

Plaintiffs' fifth issue in their Motion in Limine seeks an order precluding the defendant from introducing certain portions of the deposition testimony of Donald Caparro on the grounds that his testimony constitutes inadmissible settlement discussions and improper opinion testimony. Defendant argues that the statements of Donald Caparro were not made during the course of settlement negotiations, and furthermore, that they constitute admissions of a party, which are admissible anyway.

The statements in question were made during the defense's deposition of the plaintiff, Donald Caparro. The deposition was taken in preparation for trial. At the time of the deposition, there is no evidence before the Court that there were on-going settlement negotiations between the parties, nor evidence of any settlement offer on the table. However, even if there had been on-going settlement negotiations, a distinct admission of a fact is not to be excluded merely because it was accompanied by an offer to compromise the suit.

In the instant case, during his deposition taken in preparation for trial, Donald Caparro stated that Woods does not owe him any money and that the Caparros owe Woods the balance remaining on their account. Moreover, during his deposition, Donald Caparro never offered an opinion regarding the value of plaintiffs' breach of contract claim. He stated only that he did not have the ability to evaluate the value of the services which he alleges his son did not receive, that no one has made such an evaluation on plaintiffs' behalf, and that neither he nor anyone on his behalf has computed the difference between the fair value of the services rendered by Woods and

the amounts actually charged by Woods for those services. (Def.'s Resp. to Pls.' In Limine Motion, Ex. "A.")

Thus, Donald Caparro's statements given during the course of his deposition should not, on the present record, be precluded by pretrial motion. Accordingly, plaintiffs' pretrial motion will be denied without prejudice, and the parties will have the opportunity to make relevant objections as to the admissibility of evidence in the context of the trial.

An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DONALD and KATHERINE CAPARRO, :
as next friends and parents of :
GREGORY CAPARRO :
Plaintiffs, :

v.

CIVIL ACTION

NO. 95-2310

WOODS SERVICES, INC.,
Defendant.

:
:
:
:
:
:

ORDER

AND NOW on this 30th Day of October, 1997, in consideration of Plaintiffs' Motion in Limine and supporting submissions, and Defendant's Responses thereto, it is HEREBY ORDERED that Plaintiffs' Motion is DENIED without prejudice.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.